

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ROBERT McCaffrey,
Petitioner,

CIVIL ACTION

v.

NO. 05-40146-RWZ

DAVID L. WINN,
Respondent.

MEMORANDUM AND ORDER

ZOBEL, D. J.

For the reasons stated below: (1) Petitioner's Motion for Leave to Proceed *in forma pauperis* (#2) is denied and Petitioner is directed to pay the \$5.00 filing fee within forty-two (42) days of the date of this Memorandum and Order; and (2); notwithstanding the unresolved filing fee issue, the Respondents are directed to file a response to the petition

BACKGROUND

On August 26, 2005, Petitioner Robert McCaffrey, an inmate at FMC Devens in Ayer, MA, filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241, seeking release to home confinement due to exceptional medical circumstances and failure to receive proper medical care. Petitioner also filed an Application to Proceed without Prepayment of Fees (#2), however, he indicates in an attachment to the Application that he can afford to pay the filing fee, and intends to pay the filing fee, but seeks information as to the amount of the filing fee due for this petition.

ANALYSIS

I. Application to Proceed In Forma Pauperis

A petitioner seeking habeas relief pursuant to 28 U.S.C. § 2241 must either (1) pay the \$5.00 filing fee for habeas corpus actions, or (2) file an Application to Proceed without prepayment of fees, accompanied by a document certifying the amount of funds on deposit to the petitioner's credit at his institution of incarceration. See Rule 3(a) of the Rules Governing Section 2254 cases, applicable to other habeas petitions (if a petitioner desires to prosecute a

petition *in forma pauperis*, he shall file the affidavit required by § 1915 and a certified statement of the amount of funds in prisoner's institutional account)(emphasis added); See also 28 U.S.C. § 1914(a)(filing fees); § 1915(proceedings *in forma pauperis*).

Here, Petitioner filed an Application to Proceed *in forma pauperis* (#1), however, he indicated that he has filed it "but [does] not wish to use it." Letter attachment to #1. He indicates that his wife will pay the fee as soon as the amount due is known.

Accordingly, Petitioner's Application to Proceed Without Prepayment of Fees is denied without prejudice. Petitioner is directed to pay the \$5.00 filing fee within forty-two (42) days of this Memorandum and Order, or re-submit an Application to Proceed Without Prepayment of Fees. Failure to comply with this directive may result in dismissal of this action. The clerk shall provide Petitioner with a blank Application form along with this Memorandum and Order.

II. The Respondents Shall File a Response to the Petition

Notwithstanding the unresolved filing fee issues presented here, the Respondent shall file a response to the habeas petition.

Accordingly, it is hereby ORDERED:

(1) The Clerk of this Court shall serve a copy of the Petition upon (i) David Winn, Warden, FMC Devens, P.O. Box 879, Ayer, Massachusetts 01432; AND (ii) the United States Attorney; and

(2) The Respondent shall, within 20 days of receipt of this Order, file an answer or other responsive pleading.

CONCLUSION

Based on the foregoing, it is hereby ORDERED:

1. Petitioner's Motion for Leave to Proceed Without Prepayment of Fees (#2) is denied without prejudice. Petitioner shall, within forty-two (42) days of the date of this Memorandum and Order, either pay the \$5.00 filing fee, or file a renewed completed Application to Proceed Without Prepayment of Fees, accompanied by a certified copy of his prison account statement; the clerk shall provide a blank application form with this Memorandum and Order;

2. Notwithstanding the unresolved filing fee issue, the Respondent shall file a response to the petition within 20 days of the date of this Memorandum and Order.

SO ORDERED.

September 6, 2005
Date

/s/ Rya W. Zobel
RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE